

DAVIE S VIVE KANANDA

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v.

PEGALIT SDN BHD

HIGH COURT MALAYA, SHAH ALAM

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NURCHAYA ARSAD J

[CIVIL SUIT NO: 24-1560-2005]

16 FEBRUARY 2012

CONTRACT: *Housing development - Sale and purchase agreement - Stability of retaining wall - Whether adequately safe and fit - Whether plaintiff had right to sue for defects - Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd; Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors*

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The plaintiff's cause of action was based upon the sale and purchase agreement of a bungalow lot between the plaintiff and the defendant. During the construction of the house, certain issues were raised regarding the stability of the retaining wall *ie*, hairline cracks and water leakage on the said retaining wall. The plaintiff had filed an originating summons and prayed for, *inter alia*, a mandatory injunction compelling the defendant to appoint an independent engineer and for the plaintiff to be allowed to appoint an independent engineer to conduct concrete sampling test on the said retaining wall. Upon the direction of the court, both parties had undertaken their own separate coring of the said retaining wall under the supervision of the other party. Reports and experts appointed by both plaintiff and defendant were submitted to court. The expert for the plaintiff concluded that the retaining wall was defective and not fit for purpose where else the defendant refuted the claim and maintained that the wall was safe and stable. The issue that arose for this court was to decide on the stability of the retaining wall.

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Held (plaintiff succeeding partially in proceeding):

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(1) The defendant's expert's conclusion that the retaining wall was adequately safe and fit for the intended purpose was accepted. The wall was physically completed since March 2003, and until today it had performed as intended as the earth retaining structure. There was no sign of any structural or geotechnical distress since completion. Furthermore, the local authority had issued the certificate of fitness for occupation. (para 7)

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- A (2) The defendant's submission that the plaintiff did not have the right to claim any other remedy other than as provided by cl. 23 of the said agreement was not accepted. Clause 23 did not take away the plaintiff's right to sue in respect of defects found (*Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd; Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors*) Even though the said retaining wall was fit for its purpose, the defendant was still liable for the defects. (para 8)

C [Order accordingly.]

Case(s) referred to:

Chinaya Ganggaya v. Sentul Raya Sdn Bhd [2008] 3 CLJ 23 HC (**refd**)
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC (**fol**)

- D *Muhammad Jeffrey v. PP* [1997] 1 SLR 197 (**fol**)
Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd [2008] 2 CLJ 284 CA (**refd**)
Sek Kim Wah v. PP [1988] 1 CLJ 739; [1988] 2 CLJ (Rep) 679 CA (**fol**)
Singapore Finance Ltd v. Lim Kah Ngam (S'pore) Pte Ltd & Eugene HL Chan Associates (Third Party) [1984] 1 LNS 3 HC (**fol**)
- E *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors* [1996] 2 CLJ 1105 HC (**refd**)

Legislation referred to:

Housing (Control and Licensing Of Developers) Rules 1980, r. 12(1)(q)

- F For the plaintiff - *S Suresh (Amarah with him); M/s Rastam Singa & Co*
 For the defendant - *HL Teh; M/s HL Teh & Assocs*

Reported by Suhainah Wahiduddin

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JUDGMENT

Nurchaya Arsad J:

H Introduction

- I [1] The plaintiff's cause of action is based upon the sale and purchase agreement of a bungalow lot between plaintiff and defendant. During the construction of the house, certain issues were raised with regard to the stability of the retaining wall ie, hairline cracks and water leakage on the said retaining wall. Plaintiff made complaints to defendant and to which the defendant replied

that the defects will not affect the stability of the retaining wall. The plaintiff being unsatisfied filed originating summons and the prayers are as follow: **A**

1. A mandatory injunction compelling the defendant to appoint an independent engineer to conduct concrete core sampling test on the retaining wall for Lot No. 7 HS(D) No. 70298 PT No. 1610 Bandar Klang, Daerah Klang; **B**
2. The plaintiff is allowed to appoint an independent engineer to conduct concrete core sampling test on the retaining wall for the said lot; **C**
3. The expert reports to be submitted to the court;
4. The defendant to carry out rectification works and cost to be borne by the defendant; **D**
5. Damages to be paid to the plaintiff if the plaintiff has to vacate the said bungalow in order for the rectification works to be carried out;
6. Cost of the proceeding to be borne by the defendant. **E**

[2] Upon the direction of the court, both parties had undertaken their own separate coring of the said retaining wall on 15 April 2011 under the supervision of the other party. Both parties agreed to follow the British Standard and Guideline for the sampling, testing and interpretation as follows: **F**

- (a) Testing Concrete in Structure BS EN 12504-1: 2009 Part 1 Cored Specimens – Taking, Examining and Testing in Compression; **G**
- (b) Assessment of in-situ compressive strength in structures and precast concrete components – BS EN 13791: 2007 and BS EN 13791 (BS 6089:2010)

[3] Reports and experts appointed by both plaintiff and defendant were submitted to court. Since prayer (1), (2) and (3) have been carried out by both parties, what is left for the court to decide is the stability of the retaining wall. **H**

Whether The Retaining Wall Is Structurally Unstable? **I**

[4] At the outset, it must be observed that the plaintiff's case was not based upon a "total failure of consideration", neither had the plaintiff contended that the house is not fit for occupation.

A Upon the careful perusal of the affidavits, what had been contended by the plaintiff was that there were defects in the said retaining wall and the defendant had failed to rectify the defects.

B [5] Both parties have appointed their own experts and submitted their respective reports. M/s George Chambers (expert for the plaintiff) through his letter dated 26 April 2011 and 8 June 2011, concluded that the retaining wall is defective and not fit for purpose. The defendant's expert, JPS Consulting Engineers Sdn Bhd, after having perused the earlier reports, refuted the claim and maintained that the wall is safe and stable.

C [6] In assessing the quality of the experts' evidence especially when they are in conflict, I have endeavoured to follow the principles laid down in the following cases:

D – *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101;

– *Singapore Finance Ltd v. Lim Kah Ngam (S'pore) Pte Ltd & Eugene HL Chan Associates (Third Party)* [1984] 1 LNS 3;

E – *Muhammad Jeffrey v. PP* [1997] 1 SLR 197;

– *Sek Kim Wah v. PP* [1988] 1 CLJ 739; [1988] 2 CLJ (Rep) 679.

F [7] I am able to accept the conclusion of the defendant's expert, JPS Consulting Engineers Sdn Bhd that the retaining wall is adequately safe and fit for the intended purpose. Whilst a building does not have to collapse first before it can be held to be structurally unsafe, one is entitled to look at the surrounding circumstances and to draw conclusion from it. The wall was physically completed since March 2003, and until today it has performed as intended as the earth retaining structure. As rightly pointed out by the defendant's expert, there is no sign of any structural or geotechnical distress since completion. Furthermore, the local authority has issued the certificate of fitness for occupation.

G [8] However, I do not accept the defendant's submission that as regards to the Housing Developers Regulations 1989 and cl. 23 of the Sales and Purchase Agreement. The defendant, relying on

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the case of *Chinaya Ganggaya v. Sentul Raya Sdn Bhd* [2008] 3 CLJ 23 submits that the plaintiff does not have the right to claim any other remedy other than as is provided by cl. 23 of the said agreement. **A**

[9] Rule 12(1)(q) of the Housing (Control and Licensing Of Developers) Rules 1980 which states as follows: **B**

Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely:

(q) provisions binding on the licensed housing developer that he shall undertake to remedy any defect, shrinkage or other fault in the housing accommodation erected for the purchaser which defect, shrinkage or other fault may become apparent within a period of six calendar months after the date of delivery of vacant possession to the purchaser by the licensed housing developer; **C**

[10] Clause 23 does not take away the plaintiff's right to sue in respect of such defects. My reason is based upon the case of *Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd* [2008] 2 CLJ 284 where Azmel Maamor JCA in delivering judgment said as follows: **D**

The question that we have to determine is whether this cl. 23 should be construed and applied against purchasers of houses. To do that it would be incumbent upon us to trace the purpose for which cl. 23 was originally created. It began with the passing of the Housing Development (Control and Licensing) Act 1966 and the regulations made thereunder. In 1982, the Housing Developers (Contract and Licensing) Regulations came into force. And reg. 12(1) of Regulation 1982 provides that every contract of sale for the sale and purchase of a housing accommodation together with the sub-divisional portion of land appurtenant thereto shall be in the form as prescribed in Schedule E. Regulation 12(1) further provides that no amendment to any such contract of sale shall be made except on the ground of hardship or necessity and with the prior approval of the Controller. In other words, all the provisions in the sale and purchase agreements are actually statutory requirements which must be strictly complied with. Clause 23, in particular, is meant to be an additional protection for house buyers, without affecting or limiting their rights under the common law. This was the ruling made by the Privy Council in *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1987] 1 LNS 62; [1988] 1 MLJ 69. In that case Lord Templeman said: **E**

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- A But the Act of 1966 and the Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules.
- B [11] Another case of high authority that was referred to is the Federal Court's decision in *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors* [1996] 2 CLJ 1105.
- C [12] Even though they said retaining wall is fit for its purpose, the defendant is still liable for the defects. I thus ordered that the defendant to rectify within three calendar months from the date of this decision the following defects on the retaining wall:
- D (1) Waterproof cement used to give sufficient cover to the hairline cracks;
- E (2) The honeycomb wherever it may be found to be repaired by cement mortar or grouting;
- (3) To cover up the wall to prevent further water leakage.
- E (4) Other defects (based upon the correspondence) identified by the parties.
- [13] As the plaintiff succeeds partially in this proceeding, I would allow cost at RM10,000.

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